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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JENS B. MAJANO et al.,

Defendants and Appellants.

B216739

(Los Angeles County  
Super. Ct. No. GA071967)

APPEAL from judgments of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed as modified.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant Jens B. Majano.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant Larry Navarette.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant David Monterrosa.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant Jose L. Guevara.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Lance E. Winters, Deputy Attorney General, for Plaintiff and Respondent.

## **INTRODUCTION**

A jury convicted defendants and appellants Jens B. Majano, Larry Navarette, David Monterrosa, and Jose L. Guevara (defendants) of three counts of robbery (Pen. Code, § 211<sup>1</sup>) and 12 counts of false imprisonment by violence (§ 236). The jury found true the allegations that defendants committed the robberies for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1)(C) and that they committed the false imprisonments for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1)(B). The trial court found that Monterrosa served a prior prison term within the meaning of section 667.5, subdivision (b). The trial court sentenced Majano, Navarette, and Guevara to state prison for 38 years, eight months, and Monterrosa to state prison for 39 years, eight months. The trial court awarded Majano, Navarette, and Guevara 619 days of presentence credit and Monterrosa 532 days of presentence credit.

On appeal, Navarette, Monterrosa, and Guevara contend that insufficient evidence supports the jury's finding that the offenses were committed for the benefit of a gang. Navarette further contends that section 186.22 is unconstitutionally vague and its application punished him for his accomplices' gang membership, the trial court erred in instructing on the elements of the gang enhancement, and his defense counsel provided ineffective assistance by failing to object to lay testimony that he was a member of a gang. Majano contends that the trial court erred in denying his motion to bifurcate the trial of the gang allegations from trial of the charged offenses, and his defense counsel provided ineffective assistance by failing to object to a gang expert witness's testimony that the offenses were committed for the benefit of a gang. The defendants join in the

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All statutory citations are to the Penal Code unless otherwise noted.

arguments of their co-defendants to the extent that such arguments inure to their benefit. Respondent contends that the trial court incorrectly calculated the presentence credit for Majano, Navarette, and Guevara. We affirm the judgments. We order the abstracts of judgment for Majano, Navarette, and Guevara modified to reflect 608 days of presentence credit.

## **BACKGROUND<sup>2</sup>**

### **A. The Offenses At Porto's Bakery**

Jorge Aguilar, a member of the Santeria religion, operated Botanica Elegua (Botanica), an operation that performed spiritual cleansing rituals and tarot card readings.<sup>3</sup> Monterrosa and Eydi Munoz were friends, fellow practitioners of the Santeria religion, and Botanica customers. Aguilar knew Monterrosa and Munoz.

Around Thanksgiving 2007, Munoz, who worked at Porto's Bakery, told Aguilar and Monterrosa that she was upset that Porto's Bakery had not paid her for hours she had worked. Munoz also said that the bakery recently had made about \$500,000 in one day. Monterrosa suggested that they rob the bakery.

Aguilar, Munoz, and Monterrosa had four or five subsequent conversations about robbing Porto's Bakery. Other persons were present during those conversations. During one such conversation, Munoz drew a map of the inside of the bakery. Munoz said the best time to commit the robbery was after the bakery closed and the money was being counted. She said she would take out the trash through the bakery's back door, thus providing the robbers with access to the bakery.

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Because the issues that defendants raise on appeal concern the gang enhancements under section 186.22, subdivision (b)(1)(C), and not the underlying offenses, we set forth the facts of the underlying offenses briefly for context. We set forth the testimony of the prosecution's gang expert in detail, and address other gang evidence as relevant in our discussion of the issues below.

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Aguilar testified pursuant to a plea agreement that provided for a reduced sentence.

On December 26, 2007, Aguilar, Munoz, and Monterrosa met to discuss the robbery. Among others present were Majano, Navarette, and Guevara. Monterrosa assigned tasks to his co-defendants. Navarette was to tie up people, Guevara was to serve as a lookout, and Majano was to gather the money and take the surveillance video.

On December 28, 2007, defendants and others gathered at Botanica. Monterrosa brought plastic zip ties to tie up people in the bakery. Others brought white dust masks, caps, tape to tie up people, and firearms. Most of those present had walkie-talkies. Defendants and their companions traveled to Porto's Bakery and entered the bakery about 8:20 p.m.

Upon entering Porto's Bakery, the robbers ordered the bakery's employees, at gun point, to get on the ground. The robbers bound the employees with plastic ties. The robbers took money and personal property from various employees, and bakery property including a laptop and a cash counting machine. Two robbers armed with guns forced bakery manager Braulo Garcia to open the bakery's petty cash safe that held \$1 and \$5 bills and quarters, dimes, nickels, and pennies. One of the robbers emptied this safe. The bakery's accountant testified that the robbers took \$11,177 from the bakery. The bakery was equipped with a video surveillance system consisting of 16 cameras that recorded various actions of the robbers. Portions of the video of the robbery and still photographs taken from the video were shown to the jury.

Aguilar testified that after the robbery, the robbers returned to Botanica where they divided about \$11,000. Cell phone records placed Guevara and Monterrosa near Botanica immediately after the robbery. Defendants were all present when the money was divided. Navarette gave his portion of the proceeds to Guevara as a rent payment. Monterrosa inquired why the surveillance video had not been obtained.

On December 29, 2007, Burbank Police Department officers investigating the Porto's Bakery robbery went to Botanica. A Dodge van and Dodge Intrepid were parked behind Botanica. The police found empty packaging for dust masks, zip ties, a bandana, a beanie cap, a glove, and duct tape inside the van. Inside the Intrepid, the police found a cash register tray, a cash counting machine, knit caps, bandanas, paper money wraps for

different denominations, I.D. cards for victims of the Porto's Bakery robbery, a replica handgun, a Porto's Bakery bank vault receipt, a check made out to Porto's Bakery, latex gloves, and zip ties. Inside Botanica, the police found a box labeled "Dimes \$250," other similarly labeled boxes, loose cash, and rolls of coins. The police arrested Aguilar.

On December 31, 2007, Mayra Garcia held a New Year's celebration at her house. Robert Martinez, Majano, and Guevara were there. During the party, Martinez overheard Majano and Guevara bragging about a job they had done that went well. Majano and Guevara talked about being "hot" and expressed a desire to move to Texas. Martinez assumed the reference to being "hot" meant that the police were after Majano and Guevara.

On January 1, 2008, the police arrested Majano at Mayra Garcia's house. An officer interviewed Majano and asked Majano to tell him what happened during the robbery. Majano responded, "If I do, the M.S. 13 gang or the Mara Salvatrucha gang would retaliate and kill me." The police arrested Navarette and Guevara later that day, and Monterrosa on February 22, 2008.

On January 2, 2008, Burbank Police Department officers interviewed Navarette. At first, Navarette denied participating in the Porto's Bakery robbery. After an officer showed Navarette photographs from the bakery's surveillance system, Navarette admitting participating in the robbery. Navarette told the officers that he was offered the opportunity to make money by participating in the robbery.

## **B. The Gang Expert's Testimony**

Los Angeles Police Department Officer Rafael Lopez testified as the prosecution's gang expert. Officer Lopez was assigned to a gang task force that primarily focused on violent Hispanic street gangs such as Mara Salvatrucha Trece, which was also known as M.S. 13.<sup>4</sup> Officer Lopez's primary assignment for the prior seven to eight years had been

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<sup>4</sup> The parties stipulated that Mara Salvatrucha was a criminal street gang as defined in section 186.22.

investigating gang crimes committed by M.S. 13. Common symbols used by the gang included the letters “M” and “S,” the number “13,” and a hand sign known as the “pitch fork.”

Officer Lopez testified that Majano had various tattoos associated with M.S. 13, including a tattoo that was associated with an M.S. 13 clique (the Adams Locos clique), and a tattoo that blatantly and obviously advertised Majano’s membership in M.S. 13. Officer Lopez testified that a tattoo of three dots in a triangle signified “mi vida loca,” which is Spanish for “my crazy life.” Although gang members often had such three-dot tattoos, the tattoo was not specific to M.S. 13, and persons not in a gang could have the same tattoo. Guevara had three-dot tattoos on the left side of his wrist and on the webbing of his left hand. Navarrete had a three-dot tattoo on his left wrist.

Officer Lopez testified that during a prior contact with Monterrosa, Monterrosa admitted membership in M.S. 13. Monterrosa had a tattoo of the letters “M.S.” that covered his whole chest. Officer Lopez opined that that tattoo stood for “M.S. 13.” Monterrosa also had a tattoo of the letters “F.L.S.,” which Officer Lopez opined indicated that Monterrosa belonged to the Francis Locos clique. Officer Lopez opined that Monterrosa, Navarrete, Guevara, and Majano were members of M.S. 13.

Officer Lopez explained to the jury that respect was one of the driving forces in M.S. 13. Officer Lopez testified that an M.S. 13 gang member built comradeship and trust with, and earned respect from, fellow gang members by committing crimes with them. The more crime a member committed, the more the member would be seen as loyal to the gang, earning the member respect and rank within the gang. Crimes by individual gang members bolstered the gang’s reputation. M.S. 13 was a very violent gang. By committing violent crimes, M.S. 13 sent a message to the community and to rival gangs that M.S. 13 was a serious criminal gang that was willing to commit any type of crime.

The prosecutor asked Officer Lopez to assume certain hypothetical facts. The prosecutor asked Officer Lopez to assume, among other facts, that defendants committed a robbery at Porto’s Bakery on December 28, 2007, with several other persons;

Monterrosa helped plan the robbery and traveled to the bakery with other robbers to serve as a lookout; Navarette and Majano traveled to the bakery with five other persons; Navarrete and Majano were dressed in masks and dark clothes; Navarette carried a real firearm and Majano carried a replica firearm; Navarette and Majano entered the bakery, tied up 12 employees, forced the manager to open the safe and give them the money inside, and stole wallets from three employees; Guevara traveled to the bakery where he acted as a lookout for Navarrete and Guevara while they were inside committing the robbery; all of “them” communicated by walkie-talkie during the robbery; and after the robbery, “they” returned to a business where they gathered prior to the robbery and divided the “loot.” Based on those facts, and given Officer Lopez’s opinion that “they” were all members of M.S. 13, Officer Lopez testified that the robbery in the hypothetical could the benefit a criminal street gang in several ways.

Officer Lopez explained to the jury that a crime such as the prosecutor described could benefit the gang financially because gangs use money to purchase narcotics and firearms. Officer Lopez further explained that committing a crime such as the prosecutor described would bolster the gang’s reputation, causing the gang to gain notoriety as a more violent street gang resulting in more respect for the gang. The individual members who committed the robbery also would benefit financially as whatever they “netted” from the crime was theirs to keep. Participation in the robbery also would benefit the individual members by bolstering their reputation in the gang and respect in the gang.

On cross-examination, Officer Lopez was asked how the robbery would benefit the gang or enhance its reputation in the community if none of the participants “used the words M.S., Mara Salvatrucha, or displayed any of their tattoos” and none of the robbery victims knew the robbers were gang members. Officer Lopez responded that the robbery would still benefit the gang financially.

Officer Lopez further testified that even if the gang did not benefit financially and even if the robbery victims did not know that gang members committed the robbery, he would expect the gang members who participated in the robbery might brag about the robbery to other gang members. The gang and the individual gang members would

benefit by the member's ability to brag about having committed the crime. The individual gang members' reputations would increase as they would become known as more loyal and active members of the gang.

## **DISCUSSION**

### **I. Navarette's Challenges To The Specific Intent Requirement In The Gang Enhancement Statute**

To prove a gang enhancement allegation under section 186.22, subdivision (b), the prosecution must prove that the defendant committed the crime "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Navarette contends that, in order to be constitutional, the specific intent requirement in section 186.22, subdivision (b) can only apply to defendants who assist gang members *because* they are gang members. Based on this contention, Navarette makes three arguments. First, Navarette argues that the specific intent requirement is unconstitutionally vague. Second, Navarette argues that if the specific intent requirement is satisfied by evidence that a defendant assisted persons who happened to be gang members, then the defendant would be punished for another person's gang membership. Third, Navarette argues that the instruction on the gang enhancement was deficient in that it was ambiguous for failing to make clear that Navarette had to have the intent to assist in the crimes of the gang members because they were gang members.<sup>5</sup>

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Navarette acknowledges that he did not raise any of these issues in the trial court, but argues that he did not forfeit the issues either because they are reviewable without an objection in the trial court or because defense counsel was ineffective for having failed to object. Respondent does not argue that Navarette forfeited any of these issues.

A. *The Specific Intent Requirement in the Gang Enhancement Statute is not Unconstitutionally Vague*

Navarette argues that the specific intent requirement is unconstitutionally vague because it can be interpreted as requiring either that a defendant intended to assist the criminal conduct of persons “who just happen to be gang members without regard for that membership,” or that a defendant intended to assist the criminal conduct of others “because of their gang membership.” Navarette argues that the specific intent requirement is vague as it was applied to him because, although the evidence showed that he participated in the offenses with other gang members, “it was not clear that his intention had anything to do with their gang membership,” i.e., that he intended to assist the gang members because they were gang members. The specific intent requirement in the gang enhancement statute is not unconstitutionally vague.

“A law is void for vagueness only if it ‘fails to provide adequate notice to those who must observe its strictures’ and “‘impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’” [Citations.]” (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332.) “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.’ [Citation.]” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115.)

Our Supreme Court “has recognized ‘the strong presumption that legislative enactments “must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute . . . cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.’” [Citation.] Therefore, ‘a party must do more than identify some instances in which the application of the statute may be uncertain or ambiguous; he must demonstrate that “the law is impermissibly vague *in all of its applications*.” [Citation.]’ [Citation.] Stated differently, “[a] statute is not void simply because there may be difficulty in determining

whether some marginal or hypothetical act is covered by its language.” [Citation.]’ [Citation.]” (*People v. Morgan* (2007) 42 Cal.4th 593, 605-606.)

In *People v. Morales* (2003) 112 Cal.App.4th 1176 (*Morales*), the defendant challenged the sufficiency of the evidence supporting a finding of specific intent under the gang enhancement statute. The court of appeal held, “[S]pecific intent to *benefit* the gang is not required. What is required is the ‘specific intent to promote, further, or assist in any criminal conduct by gang members . . . .’ Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with Flores and Moreno, and that he knew that Flores and Moreno were members of his gang. Moreover, . . . there was sufficient evidence that defendant intended to aid and abet the robberies Flores and Moreno actually committed. It was fairly inferable that he intended to assist criminal conduct by his fellow gang members.” (*Id.* at p. 1198.)

Navarette contends that the specific intent required under section 186.22, subdivision (b) is the intent to “promote, further, or assist” the criminal conduct of a gang member *because* that person is a gang member. The statute expressly requires only the specific intent to assist “gang members.” (*Morales, supra*, 112 Cal.App.4th at p. 1198; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [“Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]”].) Such an express requirement is not reasonably interpreted to apply to aiding people who “happen” to be gang members or to aiding gang members “because” of their gang membership. Rather, the statute plainly sets forth that the defendant must have the “specific intent to . . . assist . . . gang members” (§ 186.22, subd. (b)(1))—not because the person is a gang member or happens to be a gang member. Because of the specific intent requirement, as interpreted in *Morales*, the defendant must know the person being assisted is a gang member. Accordingly, the specific intent requirement in the gang enhancement is not unconstitutionally vague as written. Likewise, the specific intent requirement was not unconstitutionally vague as applied to Navarette because Navarette was an M.S. 13 gang

member who participated in the offenses at Porto's Bakery in association with others he knew were M.S. 13 gang members. A jury fairly could infer that Navarette intended to assist the criminal conduct by his fellow gang members. (*Morales, supra*, 112 Cal.App.4th at p. 1198; *People v. Villalobos, supra*, 145 Cal.App.4th at p. 322.)

Navarette attempts to demonstrate an ambiguity in the specific intent requirement by relying on the statement in *People v. Ramon* (2009) 175 Cal.App.4th 843, 849 that "[t]he section 186.22(b)(1) enhancement requires the jury to find that the crime was committed for the benefit of a criminal street gang and with the specific intent *to promote the criminal street gang*." (Italics added.) The court also said that "(1) Ramon was with another gang member, and (2) Ramon was in gang territory. These facts, standing alone, are not adequate to establish that Ramon committed the crime with the specific intent to promote, further, or assist criminal conduct by gang members." (*Id.* at p. 851.) So long as a defendant knows that he is assisting a gang member in the commission of the offense, he falls within section 186.22, subdivision (b)(1). (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 661, fn. 7.) Notwithstanding anything to the contrary in *People v. Ramon*, the language of the statute is sufficiently clear. Section 186.22, subdivision (b)(1) requires the specific intent to "promote further, or assist in any criminal conduct by *gang members*."

*B. The Specific Intent Requirement in the Gang Enhancement Statute Does Not Violate the Constitutional Rights of Freedom of Association and Due Process by Punishing a Defendant Based on Another Person's Gang Membership*

Navarette argues that if the specific intent requirement is satisfied merely by evidence that a defendant assisted persons who happened to be gang members, then his due process rights were violated because he would be punished for another person's membership in a gang. We disagree.

Citing *Scales v. United States* (1961) 367 U.S. 203, 228-230, which held that a statute criminalizing group membership violates the constitutional principles of freedom

of association and due process unless the statute includes a requirement that the defendant knew of the group's illegal goals and entertained the specific intent to advance those goals, Navarette argues that due process requires that the specific intent requirement in the gang enhancement statute be construed to include an intent to further the illegal aims or goals of a gang. Our Supreme Court rejected this argument in *People v. Loeun* (1997) 17 Cal.4th 1. There, the court stated, "The analogy that defendant draws between statutes that infringe on protected associational rights and California's STEP [Street Terrorism Enforcement and Prevention] Act is inapt because the STEP Act does not criminalize group membership. As we explained in *People v. Gardeley* [(1996)] 14 Cal.4th 605, 623-624, the STEP Act punishes *conduct*, not association. Moreover, the STEP Act satisfies the requirements of due process by 'impos[ing] increased criminal penalties only when the criminal conduct is felonious and committed not only "for the benefit of, at the direction of, or in association with" a group that meets the specific statutory conditions of a "criminal street gang," but also with the "specific intent to promote, further, or assist in any criminal conduct by gang members." ([Former] § 186.22, subd. (b)(1).)' (*Gardeley, supra*, 14 Cal.4th at pp. 623-624.) We do not understand the due process clause to impose requirements of knowledge or specific intent beyond these, and defendant cites nothing to convince us otherwise." (*People v. Loeun, supra*, 17 Cal.4th at p. 11; see also *People v. Castenada* (2000) 23 Cal.4th 743 [section 186.22, subdivision (a) does not punish for mere membership or association with members, but rather for knowingly associating with a gang member in the commission of a crime].)

*C. The Trial Court Properly Instructed the Jury on the Specific Intent Requirement in the Gang Enhancement Allegation*

Navarette argues that if the gang enhancement requires the specific intent to assist the crimes of persons *because* they are gang members, then the instruction on the enhancement was deficient because it told the jury that Navarette had to have "intended to assist, further, or promote criminal conduct by gang members." The trial court

properly instructed the jury on the specific intent requirement in the gang enhancement allegation.

“Generally, the statutory language defining a crime is an appropriate and sufficient basis for an instruction. (*People v. Estrada* (1995) 11 Cal.4th 568, 574 [46 Cal.Rptr.2d 586, 904 P.2d 1197] [“If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language”].)” (*People v. Williams* (2009) 170 Cal.App.4th 587, 639.) To be subject to the gang enhancement in section 186.22, subdivision (b), a defendant must have had the “specific intent to promote, further, or assist in any criminal conduct by gang members.” The trial court instructed the jury on the gang enhancement allegation with CALCRIM No. 1401 which tracks the language in section 186.22, subdivision (b). CALCRIM No. 1401 provided, in relevant part, that the prosecution had to prove that Navarette “intended to assist, further, or promote criminal conduct by gang members.”

We held above, that the specific intent requirement in section 186.22, subdivision (b) does not require the specific intent to assist the crimes of persons *because* they are gang members or happen to be gang members but rather to assist those known to be gang members in the commission of a crime. Because the specific intent requirement in section 186.22 properly states the prosecution’s burden of proof, an instruction defining the prosecution’s burden of proof based on the statute’s language was proper. (See *People v. Williams, supra*, 170 Cal.App.4th at p. 639.)

## **II. Sufficient Evidence Supports The Jury’s Finding That The Defendants Committed The Offenses With The Specific Intent To Assist In Criminal Conduct By Gang Members**

To prove a gang enhancement allegation under section 186.22, subdivision (b)(1), the prosecution must prove (1) that the defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang, and (2) that the defendant had the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Gardeley, supra*, 14 Cal.4th at pp. 616-617.)

Navarette, Monterrosa, and Guevara do not challenge the insufficiency of the evidence supporting the first element of the gang enhancement statute—that they committed the offenses at Porto’s Bakery for the benefit of, at the direction of, or in association with a criminal street gang. Instead, they challenge the sufficiency of the evidence supporting the second element of the gang enhancement statute—that they committed the offenses at Porto’s Bakery with the specific intent to assist in criminal conduct by gang members. Sufficient evidence supports the jury’s specific intent finding.

A. *Standard of Review*

“‘When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) “We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 919.) “A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support”’ the jury’s verdict. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) “Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom.” (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) “We ‘must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]’ [Citation] . . . . ‘[I]t is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.]’” (*People v. Zamudio, supra*, 43 Cal.4th at pp. 357-358.) The law that governs a claim that insufficient evidence supports a conviction also applies to a claim that insufficient evidence supports a gang enhancement finding. (*People v. Villalobos, supra*, 145 Cal.App.4th at pp. 321-322.)

*B. Relevant Principles*

The specific intent requirement in section 186.22, subdivision (b) requires the prosecution to prove that the defendant committed the crime “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” As we discussed above, the specific intent requirement requires only the specific intent to assist “gang members.” (*Morales, supra*, 112 Cal.App.4th at p. 1198; *People v. Villalobos, supra*, 145 Cal.App.4th 310, 322.) This requirement is satisfied when the evidence demonstrates the “[c]ommission of a crime in concert with known gang members.” (*People v. Villalobos, supra*, 145 Cal.App.4th at p. 322, citing *Morales, supra*, 112 Cal.App.4th at p. 1198.)

Here, the evidence shows that all four defendants were M.S. 13 gang members, and thus it may be inferred they knew of each other’s gang affiliations, that the defendants knew each other, and that the defendants assisted each other in the offenses at Porto’s Bakery. Such evidence is sufficient to satisfy the specific intent requirement in section 186.22, subdivision (b). (*Morales, supra*, 112 Cal.App.4th at p. 1198; *People v. Villalobos, supra*, 145 Cal.App.4th at p. 322.)

In support of their contention that insufficient evidence supports the specific intent requirement in the gang enhancement statute, Navarette, Monterrosa, and Guevara cite to the holding in *People v. Ramon, supra*, 175 Cal.App.4th at p. 849 that “[t]he section 186.22(b)(1) enhancement requires the jury to find that the crime was committed for the benefit of a criminal street gang and with the specific intent to promote the criminal street gang,” and argue that the evidence did not establish they committed the offenses at Porto’s Bakery to benefit the M.S. 13 gang. For example, Navarette contends that he used the proceeds to pay his rent. This “benefit” argument, however, is unavailing because, in proving “*specific intent*,” the prosecution is not required to prove a defendant’s “specific intent to *benefit* the gang.” (*Morales, supra*, 112 Cal.App.4th at p. 1198.)

### **III. Navarette Has Not Shown That His Defense Counsel Was Ineffective In Failing To Object To Lay Witness Testimony That He Was A Member Of The M.S. 13 Gang**

Navarette contends that his defense counsel's performance was ineffective because defense counsel failed to object to lay testimony from Aguilar and Mayra Garcia that he was a member of the M.S. 13 gang. Navarette fails to show ineffective assistance.

#### *A. Background*

Aguilar testified that he knew Monterrosa to be an M.S. 13 gang member. Later, Aguilar testified that Majano, Navarette, and Guevara also were members of the M.S. 13 gang. Asked how he knew this, Aguilar responded, "Because all of them are homeboys." Still later, Aguilar testified that he had seen all four defendants greet each other with what he believed were M.S. 13 hand signals.

On January 1, 2008, Burbank police officers interviewed Mayra Garcia. A tape of that interview was played for the jury. In the interview, Garcia stated that "Porky" or "Larry" was an "M.S." member from the Adams clique.<sup>6</sup> Navarette's defense counsel did not object to Aguilar's testimony or the admission of the recording of Garcia's taped interview.

#### *B. Relevant Principles*

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]" (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.) "Generally, . . . prejudice must be

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<sup>6</sup> At trial, Aguilar identified Navarette as "Porky."

affirmatively proved. [Citations.] ‘It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster, supra*, 111 Cal.App.4th at p. 383.)

“When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) “A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Evidence Code section 702, subdivision (a) provides, “Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.”<sup>7</sup> Evidence Code section 800 addresses lay opinion testimony and provides, “If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony.”

The record on appeal does not reveal the reason Navarette’s defense counsel failed to make a foundational objection to Aguilar’s challenged testimony or to the admission of the challenged statements in Garcia’s recorded interview. It may be that defense counsel

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Evidence Code section 801 concerns the admissibility of expert witness opinion testimony.

did not object because he understood that the testimony was of a fact and not an opinion. Defense counsel also may not have objected because he knew that the prosecution could establish a foundation for the challenged evidence and that the foundation would have harmed Navarette's defense. Navarette rejects this latter proposition, arguing that the prosecution attempted to lay a foundation for Aguilar's testimony but failed when the prosecutor asked Aguilar how he knew Majano, Navarette, and Guevara were M.S. 13 gang members and Aguilar responded, "Because all of them are homeboys." That the prosecutor's unchallenged exchange with Navarette may have failed to lay a proper foundation does not mean that the prosecutor was unable to lay such a foundation. With respect to Garcia's recorded statement, Navarette argues that the police made no effort in their interview to lay a foundation for Garcia's statement that Navarette was an M.S. 13 gang member and, because Garcia testified at trial that she was unsure whether Navarette was an M.S. 13 gang member, the prosecution could not possibly lay a proper foundation. Absent an objection by defense counsel that required the prosecutor to lay a foundation for Garcia's recorded statement, it is unclear whether the prosecutor could have laid a proper foundation, notwithstanding Garcia's initial trial testimony. If pressed by the prosecutor, Garcia may have become more certain about Navarette's gang membership. Accordingly, because the record does not reveal the reason that Navarette's defense counsel did not object to the challenged evidence, any claim of ineffective assistance with respect to the asserted deficiencies is better suited to a petition for writ of habeas corpus. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 267.)

#### **IV. The Trial Court Properly Denied Majano's Motion To Bifurcate Trial Of The Gang Enhancement Allegations**

Majano contends that the trial court abused its discretion when it denied his motion to bifurcate trial of the gang enhancement allegations under section 186.22 from trial of the charged offenses. The trial court's error, Majano contends, deprived him of his state and federal constitutional rights to due process and a fair trial. The trial court properly denied the motion.

*A. Background*

Prior to trial, Monterrosa moved to bifurcate trial of the gang enhancement allegations. Majano, Guevara, and Navarette joined the motion. The trial court denied the motion, finding that gang evidence had “great relevance” because of the “organized nature of the robbery.” Because the robbery involved several participants, the trial court reasoned, its participants would want to have some confidence that the other participants were not going to “snitch [them] out,” were persons who could be relied on, and were persons in whom one could confide. The trial court stated, “it’s clear to me that the organized criminal activity like this certainly suggests that the people knew each other and had trust and faith in their fellow participants, and I think it is highly relevant that most, if not all of them, were members of the same criminal street gang.” Responding to defense counsel’s argument that the robbery was for personal gain and not gang-related because it was planned by Aguilar, a non-gang member, the trial court reasoned that a non-gang member might well enlist the assistance of his neighborhood gang to aid in a take-over robbery of a large retail establishment. The trial court reasoned that the organized nature of the take-over robbery was unlike a typical street robbery involving gang members that generally is committed for personal gain. The trial court acknowledged the potential for prejudice that gang evidence presents, and stated that it would keep the presentation of gang evidence within “reasonable limits.”

*B. Standard of Review*

A trial court has the authority to bifurcate trial of a gang enhancement allegation from the determination of the charged offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) We review a trial court’s denial of a motion to bifurcate trial of a gang enhancement allegation for an abuse of discretion. (*Ibid.*) A “trial court’s discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged.” (*Id.* at p. 1050.)

### C. *Relevant Principles*

Evidence in support of a gang enhancement allegation under section 186.22 “need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

Evidence of gang membership is often, however, relevant to, and admissible to prove, the charged offense. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) “Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]” (*Id.* at pp. 1049-1050.) Moreover, “[e]ven if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.)

Here, the trial court acted within its discretion in denying the motion to bifurcate because the gang evidence was relevant to the charged offenses. As the trial court reasoned, it helped explain why a significant number of people had a level of comfort with their co-participants such that they were willing to band together to commit a take-over robbery of a large retail establishment. Gang evidence that is relevant to guilt issues such as motive, identity, and intent is admissible. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.) Moreover, notwithstanding Majano’s characterization of the M.S. 13 gang as “notorious,” Majano does not point to any gang evidence that fairly could be

described as “so extraordinarily prejudicial, and of so little relevance to guilt, that it threaten[ed] to sway the jury to convict regardless of the defendant’s actual guilt.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

**V. Majano Has Not Shown That His Defense Counsel Was Ineffective In Failing To Object To Officer Lopez’s Testimony**

Majano contends that his defense counsel provided ineffective assistance when he failed to object to Officer Lopez’s testimony that the offenses at Porto’s Bakery were committed for the benefit of the M.S. 13 gang. Majano fails to show ineffective assistance.

Officer Lopez testified, based on assumed facts in the prosecutor’s hypothetical modeled on the Porto’s Bakery robbery, that the offenses in the hypothetical benefited a criminal street gang and the gang members who committed the offenses. This testimony was inadmissible, Majano contends, because it impermissibly addressed a question of law, usurped the jury’s function as the trier of facts, and directly addressed the issue of whether [he] committed the robbery for the benefit of the M.S. 13 gang.”

Evidence Code section 801, subdivision (a) limits expert witness testimony to testimony “[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” “Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (Evid. Code, § 805.) Nevertheless, an expert’s opinion is inadmissible if it invades the province of the jury to decide a case. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182.) However, courts “have repeatedly recognized that expert testimony is admissible on the issue of “whether and how a crime was committed to benefit or promote a gang.” [Citations.]” (*People v. Williams, supra*, 170 Cal.App.4th at p. 621 [“there was no error in the admission of expert opinion testimony that the crimes were for the purpose of benefiting the gang”]; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 928, 930-931 [the trial court properly allowed a gang expert to opine that drugs in the defendant’s possession were intended to be sold for

benefit of the gang and that the proceeds would be used to benefit the gang]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 507-509 [an opinion that a defendant acted to benefit a gang is not tantamount to an opinion that a gang enhancement allegation is true because there were other elements to the allegation that had to be proved].)

“The failure to object to admissible evidence does not constitute ineffective assistance of counsel when to do so would have been futile. [Citations.] ‘Moreover, the decision to object or not to object to the admission of evidence is inherently tactical, and a failure to object will seldom establish ineffective assistance. [Citation.]’ [Citation.]” (*People v. Ferraez, supra*, 112 Cal.App.4th at pp. 934-935.)

Majano argues that Officer Lopez’s testimony addressed one of the primary questions before the jury—“Did [Majano] rob the bakery for the benefit of a criminal street gang.” Defense counsel was ineffective, Majano argues, for failing to object to testimony on that question. Whether an offense was committed for the benefit of a criminal street gang is properly subject of expert testimony. (*People v. Williams, supra*, 170 Cal.App.4th at p. 621; *People v. Ferraez, supra*, 112 Cal.App.4th at pp. 928, 930-931; *People v. Valdez, supra*, 58 Cal.App.4th at pp. 507-509.) Because Officer Lopez’s testimony was admissible, defense counsel was not ineffective for failing to object to its admission. (*People v. Ferraez, supra*, 112 Cal.App.4th at pp. 934-935.)

To the extent that Officer Lopez’s challenged testimony was inadmissible, the record does not reveal the reason that Majano’s defense counsel did not object to the evidence. Absent a record addressing this issue, any claim of ineffective assistance is better suited to a petition for writ of habeas corpus. (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 267.)

## **VI. Presentence Credit**

Respondent contends that the trial court erred in calculating presentence credit for Majano, Navarette, and Guevara. Navarette agrees. Majano and Guevara do not directly

address the issue.<sup>8</sup> We agree that the trial court miscalculated the presentence credit for these defendants.

Defendants are entitled to credit for all days in custody commencing with the day of arrest (*People v. Taylor* (2004) 119 Cal.App.4th 628, 645) and including partial days and the day of sentencing (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Fugate* (1990) 219 Cal.App.3d 1408, 1414). Conduct credit for persons convicted of a violent felony enumerated in section 667.5, subdivision (c), such as robbery (§ 667.5, subd. (c)(9)), is limited to 15 percent of the number of days of actual custody. (§ 2933.1, subd. (c).) A trial court’s failure to award the correct amount of presentence credit is an unauthorized sentence that may be corrected at any time. (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.)

Majano, Navarette, and Guevara were arrested on January 1, 2008, and sentenced on June 12, 2009. Based on the representation by Guevara’s defense counsel that that period consisted of 538 days, the trial court awarded Guevara 619 days of presentence credit consisting of 538 days of actual custody credit and an additional 81 days of conduct credit. Defense counsel for Majano and Navarette also represented that their clients had been in custody for 538 days, and the trial court also awarded them 619 days of presentence credit.

The correct calculation for actual custody for the period from and including January 1, 2008, to and including June 12, 2009, is 529 days, not 538 days. Based on that calculation, Majano, Navarette, and Guevara were entitled to a total of 608 days of presentence credit consisting of 529 days of actual custody credit and 79 days of conduct credit—such conduct credit being limited to 15 percent because these defendants were convicted of robbery (§§ 2933.1 & 667.5, subd. (c)). Accordingly, the abstracts of judgment for Majano, Navarette, and Guevara are ordered modified to reflect 529 days of

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<sup>8</sup> In his reply brief, Majano joins in his codefendants’ arguments to the extent they “apply” to him. In his reply brief, Guevara joins in any argument in his codefendants’ reply briefs that “inures to [his] benefit.”

actual custody credit and 79 days of conduct credit for a total of 608 days of presentence credit.

**DISPOSITION**

The judgments are affirmed. We order the abstracts of judgment for Majano, Navarette, and Guevara modified to reflect to reflect 529 days of actual custody credit and 79 days of conduct credit for a total of 608 days of presentence credit.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.